

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Wednesday, August 31, 2011 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	David Parker	Vice Chairman (video conference)
	John A. McCarthy, Jr.	Member
	Kathy Oster	Member
	Susan Strickler	Member
	Laura McGrory	Director
	Andrew Wade	Chief Legal Counsel
	Darin Perkins	Director, ADOSH
	Renee Pastor	Self Insurance
	Michael Hawthorne	Chief Financial Officer
	Kamen Kovatchev	Accounting
	Teresa Hilton	Commission Secretary

Chairman Delfs convened the Commission meeting at 1:02 p.m. noting a quorum present. Also in attendance were Eda Barolli of Snell & Wilmer and Jeff Homer of General Dynamics.

Approval of Minutes of August 25, 2011 Meeting

The Commission unanimously approved the Minutes of August 25, 2011, on motion of Mr. McCarthy, second of Ms. Strickler.

Discussion & Action of Proposed OSHA Citations and Penalties

Gregory Alan Welling and Jane Doe Welling	Planned
dba Majic City	Yrs/Business – 0
3737 W. Indian School Road	Empl. Cov. by Insp. – 3
Phoenix, AZ 85019	

Site Location: 3790 Grand Avenue, Phoenix, AZ 85019
Inspection #: N4762/315489419
Insp. Date: 04/20/11

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from accident.

Citation 1 - Item 1a – An employee was working from a 3' wide, 10' high fabricated frame scaffold without the working level of the scaffold being fully planked between the front uprights and the guardrail supports (1926.451(b)(1)).

Item 1b – An employee was working from a 3' wide, 10' high fabricated frame scaffold where the platform was installed so that the space between the adjacent units was more than one inch wide (1926.451(b)(1)(i)).

Item 1c – An employee was working from a 3' wide, 10' high fabricated frame scaffold where the scaffold legs and base plates did not bear on mud sills or other firm foundation (1926.451(c)(2)).

Item 1d - An employee was utilizing the cross braces of a 3' wide x 10' high fabricated frame scaffold as a means of accessing the 8'10" high working platform of the scaffold (1926.451(e)(1)).

Item 1e – An employee was working from a 3' wide, 10' high fabricated frame scaffold which had been erected without the supervision and direction of a competent person qualified in scaffold erection (1926.451(f)(7)).

Item 1f – An employee was utilizing a 6' fiberglass step ladder to increase the working level height of the platform of a wide, 10' high fabricated frame scaffold (1926.451(f)(15)).

Item 1g - An employee was working from a 3' wide, 10' high fabricated frame scaffold with the platform at a working level height of approximately 8'10", which was lacking any cross, horizontal or diagonal bracing, or combination thereof, between the northern and southern sections of scaffolding (1926.452(c)(2)).

Item 1h - An employee was working from a 3' wide, 10' high fabricated frame scaffold at a height of 8'10" that was not joined together vertically by coupling, stacking pins or equivalent means, as the extendable legs were held in position with common nails (1926.452(c)(3)).
(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from accident.

Citation 1 - Item 2a – An employee was not trained in the recognition and avoidance of the hazards associated with the use of fabricated frame scaffolds (1926.454(a)).

Item 2b – An employee had erected the fabricated frame scaffolding that was not trained by a competent person (1926.454(b)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – One employee had been working and standing near the edge of the roof structure that did not have a guardrail system installed and the employee was not using a personal fall protection system or equivalent to prevent an 9' fall hazard (1926.501(b)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 4 – The employer had not developed and implemented a fall protection training program to instruct employees in the recognition and avoidance of unsafe conditions associated with working at elevated heights of 6' or more above existing levels and on the use of guardrails or a fall arrest system to prevent a fall hazard (1926.503(a)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from

accident.

Citation 1 - Item 5a – One employee was installing stucco backing materials to the side of the building from the second step of a 6' fiberglass step ladder that was leaning up against the side of the building while it was positioned on the platform of a 3' wide x 10' high fabricated frame scaffold (1926.1053(b)(4)).

Item 5b – The employer did not provide training in the recognition and avoidance of unsafe conditions associated with the use of portable ladders (1926.1060(a)).

Div. Proposal - \$ 750.00	Formula Amt. - \$ 750.00
TOTAL PENALTY - \$3,750.00	TOTAL FORMULA AMT. - \$3,750.00

Darin Perkins summarized the citations and proposed penalty as listed. He responded to questions from the Commissioners. Following discussion, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$3,750.00 on motion of Mr. Parker, second of Ms. Oster.

Nackard Legacy dba Nackard Bottling Company	Planned
4980 E. Railhead Avenue	Yrs/Business – 64
Flagstaff, AZ 86004	Empl. Cov. by Insp. – 75
Site Location: 4980 E. Railhead Avenue, Flagstaff, AZ 86004	
Inspection #: I7163/315584559	
Insp. Date: 04/26/11	

SERIOUS – Citation 1 - Item 1 – Item 1 – One employee operated a bottle filler machine which was lacking an awareness barrier installed to prevent employees from contacting rotating and moving parts (1910.212(a)(1)).

(No inspection history in the past three years)

Div. Proposal - \$2,250.00	Formula Amt. - \$2,250.00
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SERIOUS – Citation 1 - Item 2 – One bottle conveyor was lacking a guard enclosing the rotating arm shaft (1910.219(c)(3)).

Div. Proposal - \$2,250.00	Formula Amt. - \$2,250.00
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SERIOUS – Citation 1 - Item 3 – One bottle conveyor was lacking a guard to prevent accidental contact with rotating sprockets and chain (1910.219(f)(3)).

Div. Proposal - \$2,250.00	Formula Amt. - \$2,250.00
TOTAL PENALTY - \$6,750.00	TOTAL FORMULA AMT. - \$6,750.00

Mr. Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$6,750.00 on motion of Mr. McCarthy, second of Mr. Parker.

Discussion & Action regarding Requests for Renewal of Self Insurance Authority. The Commission may move into Executive Session under A.R.S. §§38-431.03(A)(2) to discuss records exempt by law from public inspection. Legal action involving a final vote or decision shall not be taken in Executive Session. If such action is required, then it will be taken in General Session

Van Tuyl Group - Ms. Pastor presented staff's renewal report along with a current Dunn and Bradstreet credit report and responded to question from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the company's financial stability; a clean audit report and acceptable credit ratings. The Commission unanimously approved renewal of self-insurance authority on motion of Ms. Oster, second of Mr. Parker.

Discussion & Action of Applications for Renewal of Self Insurance Authority

Dole Food Company, Inc. - Renee Pastor presented staff's renewal report along with current Moody's, Fitch, Standard and Poor's, and Dunn and Bradstreet bond and credit ratings and responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the company's large size with total worldwide assets of over \$4.3 billion; a clean audit report and fair credit and bond ratings. Mr. Parker comment on the relatively low number of claims and asked if the company is properly reporting and tracking all claims. Ms. McGrory stated staff can check the company's safety programs and evaluate whether they are under reporting or putting pressure on employees not to file a claim. Ms. Oster questioned whether the company has an on-site nurse and suggested that staff also review the OSHA logs. The Commission unanimously approved continuance of self-insurance authority on motion of Mr. McCarthy, second of Ms. Strickler.

Kiewit Corporation - Ms. Pastor presented staff's renewal report along with current Moody's, Fitch, and Dunn and Bradstreet bond and credit ratings and responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority due to the company's strong financial position with assets of over \$5 billion and consistent record of profitability. Mr. Parker made a motion for approval of continuance of self-insurance authority which was seconded by Mr. Strickler. Ms. Oster questioned the low number of claims filed and requested that staff review the OSHA logs. The motion passed unanimously.

Nordstrom, Inc. - Ms. Pastor presented staff's renewal report along with current Moody's, Fitch, Standard and Poor's, and Dunn and Bradstreet bond and credit ratings and responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the company's financial stability and profitability with total assets of \$7.5 billion; a clean audit report and stable credit ratings. Mr. Parker stated that unpaid liabilities seemed low and questioned whether they were under reserving. Ms. Pastor explained that the company does a claims audit or loss run and that most claims were minor and then closed. Mr. McGrory stated that staff could review the Commission claim files. Ms. Oster stated that she would like to look at the loss run. She and Mr. Parker agreed they had no problem with the renewal, but would like the number of open claims included in the future if it looks out of the normal range. The Commission unanimously approved renewal of self-insurance authority on motion of Mr. McCarthy, second of Ms. Strickler.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers.

2C10/11-1109	Bella Mia Ristorante, L.L.C.
2C10/11-1062	Charleen Louise Hawksley, a Single Woman, dba Creek View Manor
2C10/11-1927	Enrichment Academy, LLC
2C10/11-1366	G&S Pawn and Coin, L.L.C. dba Prescott Pawn & Coin
2C10/11-1513	Ocotillo Eyecare, P.C.
2C10/11-1926	Picacho Elementary School District #33

Andrew Wade advised that with regard to the above listed employers, a compliance investigation confirmed that they were operating (or had operated) a business with employees, but without workers' compensation insurance. Giving consideration to the factors of A.R.S. §23-907(K), he recommended a civil penalty of \$500.00 be assessed against employer #1513 since they have recently obtained coverage. Mr. Wade further recommended civil penalties of \$1,000.00 be assessed against each of the remaining employers. Mr. Wade provided information regarding each of the employers and responded to questions from the Commission. Following discussion, the Commission unanimously assessed a civil penalty of \$500.00 against employer #1513 and civil penalties of \$1,000.00 against employers #1109, 1062, 1927, 1366 and 1926 with the stipulation that if employer #1926 belongs to the Arizona School Risk Retention Trust and can provide evidence of coverage through the Pool, that citation be deleted on motion of Mr. Parker, second of Mr. McCarthy.

Discussion & Action regarding Residential Fall Protection and Informal Public Hearings regarding the same

Ms. McGrory explained the procedure for the public hearing scheduled for September 6, 2011. Ms. McGrory also provided and explained the draft schedule of speakers. She described the arrangements for accommodating those speakers that may use Power point presentations. With regard to lunch break that is included in the schedule, she cautioned the Commissioners that if three or more eat lunch together, they cannot discuss any Commission business. Ms. McGrory also provided information regarding the procedure for the Tucson hearing on September 9, 2011. She stated that to date the Homebuilders' Association has provided a notebook to each of the Commissioners and the Commission has received over 1,000 signed comment cards.

Mr. Delfs explained that residential fall protection is an issue that the Commission has been grappling with for several years, in particular is the feasibility and practicality of the standard and alternative fall protection. He stated that he wanted to be careful not to influence anyone's decision, but that understanding the history of what has taken place in the past is important. He explained that residential fall protection has been a contentious issue in the past. He explained the steps taken by the Commission at that time which included the hiring of an engineering firm by the Commission. He also explained that interested parties were attending Commission meetings on a regular basis asking that the Commission look at the residential fall protection issue. Because Federal OSHA was also looking at the issue along with the national homebuilders and other interested parties, the Commission communicated the message to those in Arizona that wanted to see a change in the enforcement of residential fall protection that the issue needed to be addressed by Federal OSHA, after which Arizona would look at the issue

again. He then summarized the changes made by Federal OSHA. Mr. Perkins then explained that while Federal OSHA takes the position that conventional fall protection is feasible in residential construction, they left the door open since the standard still states that if an employer can prove that it is infeasible, then the use of alternative fall protection methods is still permitted. Mr. Perkins described that actually proving that conventional fall protection is infeasible is a key issue. He explained that Federal OSHA's position is that there are so many new products on the market, they have yet to see a situation where the use of conventional fall protection is not feasible. Ms. McGrory explained that Mr. Perkins has provided to the Commissioners a memo that walks through the chronology and history of this issue and she briefly described that history as well.

Mr. Delfs explained the different perspectives in play. One looks at the fatalities and serious injuries and the costs of those injuries. The other looks at the regulatory aspects and the impact of such regulation in a down economy. He stated he is grappling with the idea that the issue is not just one of feasibility but practicality. He stated that he does not want to give the impression to anybody that a decision has already been made, because it has not been. He stated that all of the Commissioners need a good understanding of what the issue is. Is it feasible? Can feasibility or infeasibility be proven? Is it practical or not practical? What are the implications with Federal OSHA if the state plan is not as effective as the federal plan? He stated that he had hoped that employer groups, labor unions, insurance companies and other stakeholders would have come to the table to work out the issues and make recommendations while Federal OSHA was working on this. He then explained that when the public hearings are over and all input and data has been received, the Commission has several options: Either adopt the federal standard, decline to adopt the standard, or adopt an alternative standard. Mr. Delfs stated that he does not want to rush the process, but wants to go through the entire hearing process, review all data and facts presented, and generate some good policy. He explained that on the national level, they will be watching what happens in Arizona, and that Arizona could be setting a standard for the rest of the country. Ms. Oster asked what other states were doing. Mr. Perkins stated that his memo includes an exhibit that addresses what each state plan did with regard to the interim procedures. He also explained that Federal OSHA is working on a summary document of each state's response to the December 16, 2010 directive and that summary should be available soon.

Mr. Parker explained his understanding of the history of compliance directive. Mr. Perkins agreed with Mr. Parker's summary adding that it is important to know that after the fall protection standard came out in 1994, the outcry was both national and in Arizona. He explained how the Commission worked with The Central Arizona Homebuilders' Association to address the issue. The result was that in the ensuing years, Arizona has been accepting an automatic presumption of infeasibility and a written alternative fall protection program. Mr. Perkins described how basically the same thing happened at the federal level. The one key difference between Arizona and the Federal OSHA approach was that in Arizona a written plan is required. Nationally, when OSHA came out with their directives, they said a written plan is not required. Mr. Perkins described the ensuing work by Federal OSHA on the issue which ultimately led to the rescission of the interim guidelines in December 2010. In response to a question from Ms. Oster, he stated that under the 2010 directive, each job needs to be looked at on a case by case basis for infeasibility. He likened it to the bloodborne pathogen standard in which employers are to continually review new products on the market to determine if there are safer products that can be used to protect employees. What might not work today might work tomorrow or a year from now.

Mr. Perkins summarized state plan obligations and referenced an exhibit in his memo that

highlights how each state responded to the 1995 interim guidelines. He then summarized the last section of his memo that provides information from various reports that looks at the issue from the perspective of workers' compensation losses and costs to the industry

Mr. Parker stated that his understanding of the balance when we are looking at new regulations and the impact of new regulations, in doing that analysis, we look at the question of reasonable, necessary, technically feasible and cost effectiveness. Ms. McGrory stated that in terms of looking at whether a standard or rule should be adopted, Mr. Parker has identified some key elements.

Chairman Delfs thanked Mr. Perkins for putting together the memorandum and exhibits.

Discussion &/or Action regarding Legislation

Ms. McGrory advised that there was nothing new to report.

Discussion &/or Action regarding Budget and Operations of the Industrial Commission

Ms. McGrory advised that there was nothing new to report.

Announcements and Scheduling of Future Meetings

Mr. Wade requested that the lump sum hearing scheduled for September 22nd be rescheduled. The Commission agreed to reschedule the hearing for Wednesday, October 5th.

Ms. Hilton reminded the Commissioners that the next regular Commission meeting is scheduled for Wednesday, September 14th. In addition, the informal public hearings on residential fall protection will be held on Tuesday, September 6th in Phoenix and Friday, September 9th in Tucson.

Ms. McGrory stated that the Labor Department will be providing numbers for the minimum wage update, which will be a future agenda item.

There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 2:20 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By



Laura L. McGrory, Director

ATTEST:



Teresa Hilton, Commission Secretary